IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

ALEXANDER HOOKS, Petitioner, vs. CITY OF SEATTLE and BRIAN KENNEDY as Jail Population Coordinator, Respondents.	No. 05-2-15477-2 SEA COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

THIS MATTER is before this Court on petitioner Alexander Hooks' petition for a writ of prohibition preventing his transfer by the City of Seattle to the Yakima Jail while he awaits trial in Seattle Municipal Court.

This Court previously issued an Order on Application for Alternative Writ Of Prohibition And Order To Show Cause. On May 25, 2005, the Court heard the testimony of Michael Filipovic, Jeffery Robinson, Kenya Griffin, Alexandra Ostrova, David Chapman, Kimberly Gordon, Alexander Hooks, Galia Benson-Amram, Brian Kennedy, and Cynthia West and received evidence in support and in opposition to petitioner's petition for writ of prohibition.

I. FINDINGS OF FACT

1. Petitioner is detained in lieu of $10,000 bail while he awaits trial on misdemeanor charges in Seattle Municipal Court.

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2. While awaiting trial, he has twice been transferred by the City of Seattle to the Yakima County Jail.

3. Mr. Hooks was transferred to Yakima pursuant to a contract between the City of Seattle and Yakima County. The contract is authorized by Seattle Ordinance No. 121431. That ordinance permits the City of Seattle to house convicted misdemeanants sentenced by Seattle Municipal Court in the Yakima Jail, and defendants awaiting trial as well, if certain conditions are met. One of the conditions is that Seattle Municipal Court population in the King County Jail exceeds 90% of the beds Seattle is guaranteed in that facility under the city's contract with King County. This matter before the Court does not involve nor address any convicted City of Seattle misdemeanor defendant transferred to the Yakima County Jail.

4. Respondent Brian Kennedy is the City of Seattle Jail Population Coordinator. When the Seattle Municipal Court population in the King County Jail reaches 190 individuals, Mr. Kennedy identifies pre-trial defendants for transfer to Yakima. King County jail has established a hierarchy of case type and posture in selecting detainees to go to Yakima. However, defendants in all priorities, including those in the lowest priority group, have been sent to Yakima since February 2005. Mr. Hooks wasa member of that lowest priority group– those charged with domestic violence offenses who have not yet had a pre-trial hearing at the time of his initial transfer to Yakima.

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5. Petitioner Alexander Hooks is charged with a domestic violence offense and was sent to Yakima the first time prior on April 13, 2005, prior to his pre-trial hearing on April 25, 2005. He was transferred on the same day that counsel, H.L. Rogers of Associated Counsel for the Accused, entered a notice of appearance for him.

6. For security reasons, neither jail personnel nor anyone else involved in transferring pre-trial detainees to Yakima, including Mr. Kennedy, can alert the defendants or their attorneys prior to their transfer. Counsel are advised after the transfer.

7. Mr. Kennedy will arrange for a defendant to return from Yakima to the King County Jail at the request of the defendant's attorney. Such arrangements typically take two days from Mr. Kennedy's receipt of the request.

8. If bail is posted for a defendant who held in Yakima on a pending Seattle Municipal Court case, depending on when it is posted, it can take up to 27 hours for the defendant to be returned to Seattle and released. If bail is been posted to secure a defendant's release, the defendant makes the trip back over the mountains in restraints. The trip takes at least three hours. If bail was posted on Sunday, it could take up to 51 hours for the defendant to be returned to Seattle and released, as there is presently no transport from Yakima to Seattle on Mondays.

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9. Petitioner Hooks did not post bail. Nor was there any evidence that Mr. Hooks intended to or was able to post bail.

10. When being transported back and forth between the King County Jail and Yakima, Mr. Hooks was handcuffed each time, as were other similarly situated defendants. Mr. Hooks described the pain as an 8 on a scale of 10 of level of pain. The trip took more than 3 hours each way each time. On at least one occasion the van made a stop between Seattle and Yakima at the Kirkland Jail to take on another inmate. Mr. Hooks was not permitted to go to the bathroom during one of the trips, which caused him extreme discomfort.

11. Both times that Mr. Hooks went to Yakima, he was returned because he had pending court hearings, once in Seattle Municipal Court (a pre-trial hearing) and once for the initial argument on the alternative writ in this court. On the second occasion, he was also returned at the request of his attorney so that she could convey a new plea offer made by the City Attorney.

12. Each time that Mr. Hooks was taken to Yakima, and each time he was returned to the King County Jail, he was strip searched.

13. When Mr. Hooks was moved back and forth between jails, each time he was subject to re- classification. He experienced uncertainty and worry because of the possible loss of privileges and because the moves would unsettle the accommodations he had made with other inmates and jail staff. He expressed

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concern for his personal safety and discomfort based on his housing in Yakima; and cultural differences of inmates there.

14. Mr. Hooks has been classified as a trustee (minimum security) in the King County Jail, but is housed as medium/maximum security in Yakima. Unless a sympathetic King County Jail staffer had intervened, Mr. Hooks would have had to start the process of becoming a trustee all over upon his return to the King County Jail on May 11, 2005.

15. When Mr. Hooks was transferred back from the King County Jail to Yakima, the commissary items he had managed to assemble, including personal hygiene supplies, were taken away and not returned. Out of the property he brought from King County, only his legal papers were given to him in Yakima. For some time he had to do without such items while he tried to accumulate the funds to purchase them again.

16. When Mr. Hooks was taken to Yakima the second time, on May 8, 2005, the video visitation system was not operating. His attorney went to use it upon learning that he had been transferred to Yakima, and was told it would not be operational for two weeks, although it did become operational earlier. In any event, detainees in Yakima can not initiate contact with their lawyers through video visitation even if it had been working. He attempted to call his lawyer by phone, but was unable to reach her because there was no information about a toll-free number for the Defender Association, only for Associated Counsel for

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the Accused (ACA). Yakima Jail officials told him the only way he could contact his lawyer would be to write a letter.

17. Mr. Hooks' attorney, Galia Benson-Amram, first learned that Mr. Hooks had been transferred to Yakima two days after his transfer when she went to the King County Jail on May 10 to discuss a new plea offer with him and was told he had been transferred. Information on a client's transfer is available through the King County Jail Register or through Brian Kennedy, only after the actual transfer. Ms. Benson-Amram then attempted to call him. The first time she called she was told no one was available to escort him to the phone and asked to call back in 1 ½ to 2 hours. Because of other obligations she was next able to call back approximately 3 hours later. At that time she was transferred to a number which was answered by voicemail for a number of Yakima Jail employees. There was no instruction on the message about who to contact to have a phone conversation with a defendant.

18. Ms. Benson-Amram received the new offer from the City Attorney unexpectedly, when she was dealing with another trial on the master trial calendar and saw the prosecutor in Mr. Hooks' case.

19. Ms. Benson-Amram and Mr. Hooks were never able to talk to each other while he was in Yakima despite the fact that both of them tried to reach the other.

20. Mr. Hooks did not learn of the new offer, which involved a recommendation of credit for time served, until after he was brought back to the King County Jail at Ms. Benson-Amram's request on May 11. Had he wished to accept that offer, the fact that he was in Yakima when it was made likely would have caused a

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delay up to a week to get into court for the change of plea. That is because add-on motions are typically scheduled on Fridays and require several days' advance notice. Regardless, Mr. Hooks did not accept the plea offer and there was no evidence that the delay in communicating the plea affected his decision.

21. Mr. Hooks' resolve to go to trial was undermined by the continuing apprehension that he would be returned to Yakima. He told counsel that he would plead rather than serve out the pre-trial period in Yakima, and asked her to do something to ensure he would not return to Yakima. Counsel asked the trial judge to order that Mr. Hooks not be sent back to Yakima, but the judge declined to order that Mr. Hooks remain in King County beyond May 2, shortly after the bail reduction hearing scheduled for April 29, 2005. Despite her efforts to prepare the writ of prohibition, Mr. Hooks was again sent to Yakima on May 8, 2005, the day before the writ application was filed.

22. Mr. Hooks did not learn the status of the writ application until after he was returned from Yakima on May 11, 2005. He believed he was being returned because the writ had been granted. In fact, argument was scheduled for May 16, 2005, and no writ had yet been issued.

23. Ms. Benson-Amram has visited Mr. Hooks on approximately 10 occasions in person in the King County Jail during the course of her representation of him.

24. It is a standard of practice for criminal defense lawyers to meet in person with their clients to discuss any significant issues, including discovery, case strategy, possible pleas, testimony, and release motions.

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25. It is challenging for public defenders to establish trust with clients, including Mr. Hooks, because the client has not chosen his own lawyer. Mr. Hooks needs to meet in person with his lawyer to assess counsel. Mr. Hooks had the opportunity to meet with counsel prior to the pre-trial hearing and on at least 10 other occasions face-to-face at the King County Jail.

26. In-person meetings between lawyer and client are essential for any significant communication because of the importance of non-verbal communication, and other visual observations about the client's physical, mental and emotional condition.

27. The videoconferencing system has never worked very well and has been the subject of longstanding unresolved complaints from lawyers concerning audio delay and breakup, poor visual resolution imagery of the detainees, and problems with the connection.

28. Telephone and video consultation, while possibly helpful as a supplement to in-person meetings, if they are functioning properly, do not take the place of necessary in-person meetings with in-custody defendants. Standing alone, they are inadequate for the development and maintenance of a relationship of trust and confidence between a defendant and his government-funded lawyer. They are limited in their ability to permit non-verbal communication which can convey information which is critical to the representation of the defendant. In particular, they do not allow the defendant to go over discovery and other documents or photos with his lawyer.

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29. Phone and video communication between lawyers in Seattle and clients in Yakima are not clearly confidential. Even when lawyers had been assured by the City of Seattle that telephone calls would be confidential, Yakima Jail officers and other people have frequently been able to hear the defendant's side of the conversation and sometimes counsel's statements, also. Other people are sometimes visible on the inmate's side of a video visitation, and are audible, suggesting that they must be able to hear the inmate's conversation. However, counsel and Mr. Hooks did not have any video conferencing meetings, nor was any confidentiality compromised.

30. As recently as May 23, 2005, it was impossible for Ms. Benson-Amram to establish a video link to her client Terrell Cotton, who was held in Yakima on that date (although he has not yet had his pre-trial hearing), although she followed all posted directions and sought help from the probation services department and from Brian Kennedy, as instructed on two different information sheets.

31. The process lawyers must go through in order to attempt phone or video communication with their clients in Yakima is cumbersome, time-consuming and unpredictable. An attempt to communicate may require several efforts and may then fail altogether because of technological or staffing problems. In contrast, a visit in person to the King County Jail is fast and predictable. Visits begin within 6-15 minutes of the lawyer's arrival at the jail. Visits can happen any time of the day or night. In contrast, video visitation is available only through the probation services department during the work week, and only

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during probation business hours. Family visitation is limited to certain hours on the weekends.

32. Public defenders working in Seattle Municipal Court have a caseload of approximately 380 cases per year. They can receive an average of 32 cases per month and often have 80-100 active cases at any given time. Managing this caseload requires a great deal of flexibility and last-minute adjustments to scheduling. Visits to in-custody clients, while critical, must usually be worked in and around court and office obligations. Often the best time to visit clients in the jail will occur when a trial unexpectedly resolves, for example. Conversely, what had appeared to be an opportunity to visit the jail may evaporate because of unexpected emergencies, deadlines or court obligations.

33. The City will bring defendants back to King County Jail at the request of their lawyer, approximately two days after the request.

34. A defendant faces a Hobson's Choice, of sorts, between meeting in person with his lawyer, and avoiding a discomforting trip across the mountains with the insecurities attendant to being strip-searched, re-classified in King County Jail, and losing much or all of accumulated commissary items. It appears under individual circumstances that the attorney-client relationship may deteriorate because of the attendant costs to the defendant, or in-person visits will not occur as often as they need to and as often as they would, if the defendant remained in the King County Jail.

35. Despite efforts by the City, it is clear that the systems in place to contact clients in Yakima, both phone and videoconferencing, may be inadequate to allow for

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the necessary level of attorney client communication necessary for effective representation. In this instance, Mr. Hooks' counsel met with him at least ten times in the King County Jail and there was no evidence that the level of communication necessary for effective representation had been impaired by Mr. Hooks' detention in Yakima.

36. Being in Yakima will delay a defendant's access to the court for purposes of any "add-on" motion, including previously unscheduled motions hearings, bail reduction hearings, or hearings on a change of plea. In Mr. Hooks' case, had he wished to accept the City's "time served" offer made on May 10, by the time he returned from Yakima, he may have had to wait as ling as Friday, May 20, for an add-on change of plea hearing. Being held in Yakima could have resulted in a 7-10 day delay in his release, assuming the court followed the City's sentencing recommendation. As noted, Mr. Hooks did not accept this offer and no hypothetical delay occurred.

37. Counsel must review discovery in person with their clients. Counsel are precluded from providing copies of the discovery to their clients by CrRLJ 4.7. Supplementary discovery is often provided by the prosecutor as the case proceeds. Defense investigation also develops as the case proceeds, and often must be discussed with the defendant, which requires in-person meetings. There was no indication that counsel's ability to share discovery with Mr. Hooks was impaired in this case.

38. Under the existing caseload limits pertaining to public defenders in Seattle Municipal Court, each lawyer has somewhat less than 5 hours per case to meet

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with their client, review discovery, request additional discovery, attend court hearings, conduct legal research, investigate the case, negotiate with the prosecutor, prepare for trial (if any) and conduct a trial (if any), develop alternative sentencing recommendations and advise the client about appellate rights, if relevant.

39. Due to the press of other work, public defenders practicing in Seattle Municipal Court are unable to drive to Yakima to visit their clients in person in Yakima. It is unrealistic to expect public defenders to expend the time to travel round-trip to Yakima to meet with clients housed there, given the extent of their caseload and unpredictability in scheduling.

40. The director of the largest defender agency practicing in Municipal Court believes that, while pre-trial defendants are held in Yakima, Seattle is not ensuring

> … confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

See, ABA, "10 Principles of a Public Defense Delivery System." , Commentary to Principle No. 4.

41. The transfer of pre-trial defendants to Yakima creates obstacles to communication with family and other supporters. Family who used to visit in person often can no longer do so, and certainly not with the frequency they could at the King County Jail. The cost, in time and gas, is prohibitive for

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many. Video visitation is available on the weekends only, and phone calls are collect and expensive.

42. Family members and friends may assist in the defense of someone awaiting trial in a number of ways. They may organize bail, and provide other logistical assistance to the pre-trial detainee (e.g., caring for children, pets, home; paying rent and bills; communicating with employer) allowing him to wait for his trial date rather than accept a plea offer with a "time served" recommendation so that he can get out to attend to these logistical concerns in person. The public defenders' experience is that clients held on misdemeanors are frequently offered credit for time served offers. Whether a particular defendant can remain in jail waiting for a trial date often depends on the consequences of remaining incarcerated on their employment and housing status, and any public benefits. Family, community and friends are therefore important in assisting defendants in maintaining their jobs and housing while in custody so that they may make it to their trial date. Due to the limited amount of time that Mr. Hooks actually spent in the Yakima County Jail, there was no indication that he was actually denied any of these opportunities or deprived of access to bail, logistical assistance, or other considerations.

43. Mr. Hooks has a trial date of June 1, 2005. Pursuant to jail policy, Mr. Hooks would have been returned to King County Jail awaiting trial two to three court days prior to trial, i.e., no later than May 27, 2005. Although trials are often delayed or continued, there was no indication that Mr. Hooks' trial would be delayed or continued. Moreover, there was no indication that Mr. Hooks would

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be transferred back to Yakima during such delay or continuance. Finally, the necessity for face-to-face meetings between counsel and client is less apparent once the case is actually ready to proceed to trial, and is delayed for administrative or other reasons.

44. To the extent that any Finding is more properly characterized as a Conclusion, or vice versa, the same should be treated as such.

Based upon the foregoing Findings of Fact, the Court makes the following:

II. CONCLUSIONS OF LAW

1. Petitioner seeks the extraordinary remedy of a writ of prohibition prohibiting the King County Jail, under authority from the City of Seattle, from transferring him to the Yakima County Jail, prior to his trial. The superior court has authority to issue writs of prohibition to arrest "the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." RCW 7.16.290. The statutory writ may be invoked to prohibit judicial, legislative, executive, or administrative acts if the official or body to whom it is directed is acting in excess of its power. *Winsor v. Bridges*, 24 Wash. 540, 543, 64 P. 780 (1901).

2. Prohibition is a drastic remedy and may only be issued where (1) a state actor is about to act in excess of its jurisdiction and (2) the petitioner does not have a plain, speedy and adequate legal remedy. *County of Spokane v. Local 1553, American Federation of State, County & Mun. Employees, AFL-CIO*, 76 Wash.App. 765, 768, 888 P.2d 735 (1995); *see also Kreidler v. Eikenberry*, 111

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Wash.2d 828, 838, 766 P.2d 438 (1989). If either of these factors is absent, the court cannot issue a writ of prohibition. *Kreidler*, 111 Wash.2d at 838, 766 P.2d 438.

3. R.C.W. 70.48.090 expressly provides for interlocal contracts for jail services for contracts for jail services which may be made between a county and a city, and among counties and cities.

4. Mr. Hooks has standing to seek a writ of prohibition. He has already been transferred to Yakima twice in six weeks, and nothing in the City policy on transfer of pre-trial detainees proscribes a future transfer to Yakima. Petitioner seeks to preclude his future transfer if his trial is continued for some reason.

5. Petitioner challenges the enabling legislation, Seattle City Ordinance No. 121431, authorizing transfer of pre-trial detainees - as unconstitutional as applied to Mr. Hooks. Petitioner claims that the ordinance – as applied to him – has a substantial likelihood of violating the due process clause of the Fourteenth Amendment in that it would deny, compromise and/or unduly burden Mr. Hooks' procedural rights as a criminal defendant awaiting trial, including his Sixth Amendment right to counsel, his due process right of access to the courts, his right to a jury trial, and his right to bail under Art. 1 Sec. 20 of the Washington Constitution.

6. "A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a

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reasonable doubt." *State v. Thorne*, 129 Wash.2d 736, 769-70, 921 P.2d 514 (1996). To fulfill that burden, one must show that "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *Moore*, 151 Wash.2d at 669, 91 P.3d 875. Where a statute is found facially unconstitutional, the appropriate remedy is declaring that statute inoperative or void. *Id.* In contrast, alleging a statute is unconstitutional as-applied, as petitioner contends here requires showing only that application of the statute to the party's specific actions is unconstitutional. *Id.* at 668-69, 91 P.3d 875. "Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *Id.* at 669, 91 P.3d 875. *See State v. Hughes*, 110 P.3d 192 (Wash., April 14, 2005) In *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), the United States Supreme Court found a Los Angeles ordinance unconstitutional as applied**,** "limit[ing its] analysis of the constitutionality of the ordinance to the concrete case before [the Court]." *Id.* at 803, 104 S.Ct. 2118. The Court held utility poles in Los Angeles were not public fora under the First Amendment because the challengers "fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks." *Id.* at 814, 104 S.Ct. 2118. Thus, in the instant case, this court limits its analysis of the constitutionality of the subject Seattle ordinance authorizing transfer of pre-trial detainees to the concrete case before this court.

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7. In general, challenges by pre-trial detainees to the circumstances of their confinement are analyzed under the rubric of due process. *See Bell v. Wolfish*, 441 U.S. 520, 537 n. 16 (1979). If detainees' conditions of confinement amount to punishment, "or otherwise violate the Constitution," due process is violated. Id. at 536-37. Although *Bell v. Wolfish* is most often cited for the rule that pre-trial detainees may not be "punished," it is clear that other violations of detainees' procedural due process rights may invalidate aspects of their pre-trial confinement. *See*, e.g., *Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001) (limitations on access to counsel denied due process; no argument that the limitations constituted or were intended as punishment); cf. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (regulations which obstruct access to legal representation or other aspects of access to court, even for convicted prisoners, violate due process).

8. Courts have approved the removal of *convicted* prisoners to locations far distant from their communities and families. See, e.g., *Olim v. Wakinekona*, 461 U.S. 238 (1983) (upholding transfer of prisoner from Hawai'i to mainland to serve sentence where there were inadequate detention facilities in Hawai'i); *Meachum v. Fano*, 427 U.S. 215, 224-25 (1976); *White v. Lambert*, 370 F.3d 1002 (9th Cir.), *cert denied sub nom White v. Morgan*, 160 L.Ed.2d 379 (2004) (transfer of convicted prisoner from Washington to private prison in Colorado did not violate due process); *In re Matteson*, 142 Wn.2d 298 (2000). This abrogation of prisoners' community ties is invariably justified by reference to the fact of conviction, and to the concept that convicted offenders forfeit many rights

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enjoyed by the innocent. *See*, e.g., *Olim, supra* at 248 n.9 ("respondent in no sense has been banished; *his conviction*, not the transfer, deprived him of his right to freely inhabit the State") (emphasis added); *Meachum, supra* (because conviction extinguishes liberty interests, convicted prisoners could be transferred to any prison within the state prison system).

9. The same justification does not apply to those who are still presumed innocent of the charges they face, and who are in custody solely because they cannot afford to post the bail set by the court. "Pretrial detainees have federally protected liberty interests that are different in kind from those of sentenced inmates." *Cobb v. Aytch*, 643 F.2d 946, 957 (3d Cir. 1981) (enjoining prison transfers that "significantly interfered" with pretrial detainees' access to counsel).

10. The issue before this Court is solely whether the reasonable probability of a future transfer of Mr. Hooks to Yakima prior to his trial would deny petitioner access to the court which has jurisdiction over the charges he faces and which set the terms of his pre-trial detention.

11. Even convicted prisoners' right of access to courts and counsel must be preserved:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or

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> other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. 396, 419 (1974), citing *Ex Parte Hull*, 312 U.S. 546 (1941). This interest is only heightened for pre-trial detainees who face the imminent prospect of trial, and who have a right to present changed circumstances to the court as a basis for release or modification of bail. CrRLJ 3.2(j) (1).

12. Although this Court is disturbed that access to counsel, and/or to the courts for pre-trial hearings, may be impaired as a consequence of a pre-trial detainee's transfer to and housing in Yakima County Jail, petitioner has failed to show the substantial likelihood of such impairment or deprivation to him at this stage of the municipal court litigation. As noted, Mr. Hooks has a trial date of June 1, 2005. Pursuant to jail policy, Mr. Hooks would have been returned to King County Jail awaiting trial two to three court days prior to trial, i.e., no later than May 27, 2005. Although trials are often delayed or continued, there is no indication that Mr. Hooks' trial would be delayed or continued. Thus, as to Mr. Hooks, petitioner has not demonstrated the substantial likelihood of: (1) a delay or continuance in Mr. Hooks' municipal court trial; (2) a transfer of Mr. Hooks back to Yakima; and (3) the impairment of due process access after counsel and petitioner have prepared for and are ready for a June 1, 2005 trial date.

13. Petitioner asserts that the City action he seeks to prevent – transfer to Yakima in the future – while not certain to occur, is not so speculative as to deny Mr. Hooks

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standing to seek a writ of prohibition, contrasting *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (victim of illegal chokehold lacked standing to seek prospective injunctive relief because there was no suggestion that he was any more likely than any other member of the population to be subjected to such a chokehold in the future; future injury entirely speculative.) Petitioner relies on *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) in support of the "capable-of-repetition-yet-evading-review" exception to mootness. *See* *Spencer v. Kemna*, 523 U.S. 1, 17-18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). As the *Demery* court noted, "[t]his branch applies when (1) the duration of the challenged action is too short to be litigated prior to cessation, and (2) there is a "reasonable expectation" that the same parties will be subjected to the same offending conduct." 378 F.3d, at 1027, citing *Spencer v. Kemna*, 523 U.S. 1, 17-18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998); *Mitchell v. Dupnik*, 75 F.3d 517, 528 (9th Cir.1996). Both prongs must be met. As in the current case with Mr. Hooks, in the instance of a pretrial detention center, "the length of detention in the county jail is short enough that any individual detainee's claim would probably become moot before trial." *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1117-18 (9th Cir. 2003). As the Supreme Court has explained, "[p]retrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." *Gerstein v. Pugh*, 420 U.S. 103, 111 n. 11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). In this instance, the first prong is clearly met, as Mr. Hooks has been detained temporarily in Yakima and King County jails.

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As to the second prong, a divided *Demery* court expressly found a factual basis for the substantial likelihood that plaintiffs would be reincarcerated in the offending facility:

> the record here contains compelling evidence that the plaintiffs likely will be reincarcerated at the Madison Street Jail. For example, plaintiff Benny Berryman was detained at the Madison Street Jail on twenty different occasions between February 1997 and June 2002. Eleven other named plaintiffs also have been detained at the Madison Street Jail on more than one occasion. Thus, this controversy also satisfies the capable-of-repetition prong.

Id. at 1027.

14. The Hooks record is devoid of any such evidence there is a "reasonable expectation" that petitioner will be subjected to the same objectionable conduct of a future transfer to Yakima. While it is theoretically possible that a delay in or continuance of the municipal trial could result in a transfer to Yakima and the possibility of some future due process violation, this Court can not reach such a result on this record to support the extraordinary remedy of a writ of prohibition for this petitioner. The "capable of repetition, yet evading review" exception will not be applied where there is no more than a theoretical possibility that the same party will be subject to the same action again. *See Murphy v Hunt,* 455 U.S. 478, 71 L.Ed.2d 353, 102 S.Ct. *1181* (1982) ; *Cf.* Lynch *v United States,* 557 A2d 580 (D.C. 1989) (challenge to state's bail restriction was moot where appellant had already been convicted of three offenses and it was unlikely that all three convictions would be overturned so as to place appellant in a situation where he

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might seek bail again) or where the plaintiff can show only that other people may litigate a similar claim in the future. *See Funbus Systems, Inc. v Californi*a *Public Utilities Com.*, 801 F.2d 1120, 113*1* (9th Cir. 1986).

15. Petitioner Hooks has moved to amend the writ application to join The Defender Association ("TDA") and the Associated Counsel for the Accused ("ACA") as parties. Petitioner contends the two associations representing indigent defendants have representative standing. Petitioner maintains that the City of Seattle will not be prejudiced because petitioner contends that the evidence in support of his writ was typical of those for other detainees. However, it is clear to this Court that the City will be prejudiced by such an amendment to the petition as much of the city's defense was focused on this petitioner, his experience, and absence of likely future harm to this petitioner. Petitioner's motion to amend comes after the close of evidence and closing arguments of counsel. Accordingly, in this pleading and by separate order, the motion to amend to add ACA and TDA as additional petitioners is DENIED on the basis of untimeliness.

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For the foregoing reasons, petitioner Hooks' petition for writ of prohibition to prevent his transfer by the City of Seattle to the Yakima Jail while he awaits trial in Seattle Municipal Court is DENIED.

Dated this 1st day of _June_,_ 2005.

_____/s/_____
John P. Erlick, Judge

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